LUMINOUS CROSSROADS SDN BHD

v.

LIM KONG HUAT CONSTRUCTION

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[ORIGINATING MOTION NO: MT3-25-51-98]
30 AUGUST 2001

CIVIL PROCEDURE: *Security - Security for costs - Whether defendant entitled to make application for - Rules of the High Court 1980, O. 23 - Companies Act 1965, s. 351 - Factors and circumstances to be considered - Whether necessitated an order for security for costs - Arbitration Act 1952, s. 24(3)*

This was an application by way of encl. 8 wherein the respondent, Lim Kong Huat Construction ('Lim') applied for an order that Luminous Crossroads Sdn Bhd ('Luminous Crossroads') pay the sum of RM498,298 awarded in its favour in the arbitration proceedings between the parties and an order for security for costs into court pending the final disposal of encl. 1 which is the notice of motion filed by Luminous Crossroads for extension of time to set aside the award. The issue that arose was whether the instant case contained facts and circumstances which could necessitate the grant of an order for security for costs and security for the payment of the award so as to achieve justice between the parties.

Held:

[1] Luminous Crossroads had commenced a mode of proceedings by way of originating motion which was based on O. 8 r. 3(1) of the Rules of the High Court 1980, Form 9. Luminous Crossroads was the originator of the motion and Lim was the defendant defending against attack. Lim as defendant was entitled under O. 23 of the Rules of the High Court 1980 ('RHC') and s. 351 of the Companies Act 1965 ('the Act') to make the present application in encl. 8 against Luminous Crossroads as plaintiff for security for costs. (pp 105 c & 106 e)

[2] Luminous Crossroads, as plaintiff, had changed its address during the course of the proceedings with a view to evading the consequences of the litigation. Since 8 January 1998 there was no record that Luminous Crossroads had ever filed their statutory financial reports and accounts under s. 169 of the Companies Act 1965, neither had it shown any record of its assets. Finally it was not disputed that Luminous

Crossroads had not settled its share of the arbitration costs. The facts and circumstances would necessitate the exercise of the court's discretion under O. 23 RHC and s. 351 of the Act to make an order for security for costs. Also, justice would be done to the parties herein by ordering security for the payment of the award. (p 109 d-f)

[Order accordingly; costs of the instant application in encl. 8 shall be costs in the cause.]

Case(s) referred to:

Alexandria Cotton & Trading Company (Sudan), Ltd v. Cotton Company of Ethiopia, Ltd [1965] 2 Lloyd's List Law Reports 447 ***(refd)***

Ashin Sdn Bhd v. Datuk Bandar Kuala Lumpur & Ors [1999] 4 CLJ 115 ***(refd)***

Gardner v. Jay [1885] 29 Ch D 50 ***(refd)***

Gateway Land Pte Ltd v. Turner (East Asia) Pte Ltd [1988] 2 CLJ 364; [1988] 2 CLJ (Rep) 732 ***(refd)***

MA Productions Pty Ltd v. Austrama Television Pty Ltd [1982] 1 ACLC 404 ***(refd)***

Mudariang Steel Mills Sdn Bhd & Ors v. Kwong Yik Bank Bhd & Ors And Another Suit [1999] 7 CLJ 115 ***(refd)***

Michael Bickley Pty Ltd v. Westinghouse Electric Australasia Ltd [1983] 1 ACLC 967 ***(refd)***

Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd [1973] 2 All ER 273 ***(refd)***

Skrine & Co v. MBf Capital Bhd & Anor [1998] 3 CLJ 432 ***(refd)***

Quality Tractors (M) Sdn Bhd v. United Asian Bank Bhd [1980] 1 MLJ 95 ***(refd)***

Waiheke Homes Ltd v. Laughland [1991] 3 NZLR 377 ***(refd)***

Legislation referred to:

Arbitration Act 1952, s. 24(3)

Companies Act 1965, ss. 169, 351

Rules of the High Court 1980, O. 8 r. 3(1), O. 23 rr. 1(1)(a), (b), (c), (d), 3(1)(a), (b), (c), (d)

Arbitration Act 1950 [UK], s. 23(3)

Arbitration Amendment Act 1938 [New Zealand], s. 10(3)

Companies Act [Sing], s. 388(1)

Other source(s) referred to:

Jim Delany, *Security For Costs*, 1989, p 74

For the applicant - CK Tan; M/s CK Tan & Co

For the respondent - KL Chang; M/s Chang & Partners

Reported by Suhainah Wahiduddin

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JUDGMENT

Low Hop Bing J:

Introduction

The matter before me is an application (by way of summons in chambers) b in encl. (8) wherein Lim Kong Huat Construction ("Lim") applies for an order that Luminous Crossroads Sdn Bhd ("Luminous Crossroads") do pay the sum of RM498,298 and an order for security for costs into court pending the final disposal of encl. (1) which is the notice of motion filed by Luminous Crossroads for extension of time to set aside and also to set c aside an arbitration award dated 14 August 1998 ("the award").

Submission For Luminous Crossroads

In resisting Lim's application, Encik C.K. Tan, learned counsel for Luminous Crossroads submitted that in respect of payment of money into court, or any other form of security for the award, and for the costs, the d principles are substantially the same.

In particular reference to the payment of the award into court or any other form of security, it was contended that Lim was using s. 24(3) of the Arbitration Act 1952 oppressively to stifle a genuine claim by Luminous e Crossroads.

On the issue of security for costs, the argument advanced for Luminous Crossroads is that this is a privilege accorded only to a defendant and it is never available to a plaintiff. The matter herein was said to have originated in an arbitration proceeding, in which Lim made a claim against f Luminous Crossroads and so it was submitted that Lim is the plaintiff and Luminous Crossroads, the defendant. Learned counsel relied on s. 351 of the Companies Act 1965 in support of his contention herein. He added that there is no provision of law allowing Lim as the plaintiff to apply for security for costs and that Lim's application in encl. (8) is misconceived.

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Further, he submitted that security for costs can only be ordered if one of the conditions as stated in O. 23 r. 3(1)(a) to (d) of the Rules of the High Court 1980 is satisfied and he concluded that Lim has not fulfilled any of these conditions.

h **Submission For Lim**

Encik K.L. Chang, learned counsel for Lim, is of the view that Luminous Crossroads had commenced the notice of motion before this court by using Form 9 in the Rules of the High Court 1980, in which case, Luminous Crossroads is the plaintiff while Lim is the defendant, in which case Lim i is entitled to apply for security for costs under O. 23 of the Rules of the

High Court 1980 and s. 351 of the Companies Act 1965 and security for the arbitrator's award under s. 24(3) of the Arbitration Act 1952. The grounds for Lim's application are as follows:

(a) the business address of Luminous Crossroads has changed;

(b) Luminous Crossroads has not submitted any accounts to the Registrar of Companies;

(c) Luminous Crossroads does not have sufficient assets; and

(d) Luminous Crossroads has not paid the arbitration costs.

In respect of the security for the arbitrator's award, he relied on s. 24(3) of the Arbitration Act 1952 and added that there would be no injustice to Luminous Crossroads.

Decision Of The Court

Security For Costs

The rules regulating security for costs in any action or proceeding are to be found in O. 23 of the Rules of the High Court 1980 which for purposes of completeness is reproduced as follows:

1. Security for costs of action, etc (O. 23 r. 1)

(1) Where, on the application of a defendant to an action or other proceeding in the High court, it appears to the court:

(a) that the plaintiff is ordinarily resident out of the jurisdiction; or

(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so; or

(c) subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein; or

(d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,

then, if, having regard to all the circumstances of the case, the court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.

(2) The court shall not require a plaintiff to give security by reason only of paragraph (1)(c) if he satisfies the court that the failure to state his address or the mis-statement thereof was made innocently and without intention to deceive.

(3) The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim.

2. Manner of giving security (O. 23 r. 2)

Where an order is made requiring any party to give security for costs, the security shall be given in such manner, at such time, and on such terms (if any), as the court may direct.

3. Saving for written law (O. 23 r. 3)

This Order is without prejudice to the provisions of any written law which empowers the court to require security given for the costs of any proceedings.

A pertinent observation may be made of O. 23 in that the provisions thereunder apply to enable a defendant to apply for security for costs against a plaintiff, whether an individual or a body corporate such as a company registered under the Companies Act 1965.

Similar provisions have been enacted in s. 351 of the Companies Act 1965 in the following terms:

351. Security for costs.

(1) Where a company is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

Costs.

(2) The costs of any proceeding before a court under this Act shall be borne by such party to the proceeding as the court may, in its discretion, direct.

Unlike O. 23 which is broader in scope in that an order for security for costs may be made in favour of a defendant against both individual and corporate plaintiffs, s. 351 of the Companies Act 1965 is specifically confined to a plaintiff company registered under that Act.

However, the principles enunciated in O. 23 and s. 351 above contain certain common features, in particular, the party against whom security for costs may be ordered is the plaintiff. In other words, only the defendant is entitled to make an application for security for costs.

A party is to be identified as a plaintiff or a defendant by reference to the title of the parties in the matter filed and heard in the particular court eg, in the instant case, the High Court and not, as submitted for Luminous Crossroads, the matter before the arbitrator. In the matter before me, Luminous Crossroads has initiated or commenced a mode of proceedings by way of usul pemula (ie, originating motion) which is based on O. 8 r. 3(1) of the Rules of the High Court 1980 Form 9, both of which are reproduced as follows:

3. Form and issue of notice of motion (O. 8 r. 3)

(1) The notice of an originating motion must be in Form 9 and the notice of any other motion in Form 10.

Where leave has been given under rule 2(2) to serve short notice of motion, that fact must be stated in the notice.

(1A) Order 7, rule 2(1A), shall apply in relation to the notice of an originating motion and the notice of any other motion as it applies in relation to an originating summons.

(2) The notice of a motion must include a concise statement of the nature of the claim made or the relief or remedy required.

(3) Order 6 rule 4, shall, with the necessary modifications, apply in relation to a notice of an originating motion as it applies in relation to a writ.

(4) Issue of the notice takes place upon its being sealed by an officer of the Registry.

No. 9

NOTICE OF ORIGINATING MOTION (O. 8 r. 3)

IN THE HIGH COURT OF MALAYA/SABAH
AND SARAWAK AT ...
OM No ... of 19 ...

(Seal)

In the matter of ...

and

In the matter of ...

Take notice that the Court will be moved at the expiration of ... days from the service upon you of this notice (or on the ... day of ... 19 ..., at the sitting of the Court) or so soon thereafter as counsel can be heard, by counsel on behalf of ... for an order that ... (or for the following relief, namely ...)

And that the costs of and incidental to this application may be paid by ...

(And further take notice that the grounds of this application are (state the ground)).

Dated the ... day of ..., 19 ...

...
Solicitor for the ...

Upon a proper perusal of the title in this originating motion, Luminous Crossroads is obviously the party commencing the proceedings and is therefore the plaintiff herein while Lim is obviously the defendant. I am therefore unable to accept the contention which relies on the arbitration proceedings wherein Lim was making a claim as plaintiff against Luminous Crossroads as defendant and that they have respectively continued as such in the originating motion before me.

In the originating motion before me, Luminous Crossroads is the originator of the motion and Lim is the defendant defending against attack. In the circumstances, I hold that Lim as defendant is entitled under O. 23 and s. 351 to make the present application in encl. (8) against Luminous Crossroads as plaintiff for security for costs.

It is trite law that under O. 23 and s. 351, the court has a discretion which must be exercised after considering all the circumstances of the particular case: *Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd* [1973] 2 All ER 273. In addition, this discretion is a judicial discretion which must be exercised according to established judicial principles.

In *Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd*, *supra,* Lord Denning, MR set out some factors which the court might take into consideration in exercising its discretion on whether or not to award security for costs, as follows:

(a) whether the company's claim is *bona fide* and not a sham;

(b) whether the company has a reasonably good prospect of success;

(c) whether there is an admission by the defendants on the pleadings or elsewhere that money is due;

(d) if there was payment into court of a substantial sum of money (not merely a payment into court to get rid of a nuisance claim);

(e) whether the application for security was being used oppressively – so as to try and stifle a genuine claim;

(f) whether the company's want of means has been brought about by any conduct of the defendants, such as delay in payment or delay in doing their part of the work.

The factors listed by Lord Denning, MR, above have been applied by the Australian Courts eg, in *Michael Bickley Pty Ltd v. Westinghouse Electric Australasia Ltd* [1983] 1 ACLC 967; and *MA Productions Pty Ltd v. Austrama Television Pty Ltd* [1982] 1 ACLC 404 (see also p. 74 *"Security For Costs"* by Jim Delany, 1989 published by The Law Book Company Limited).

In my view, these factors are not intended to be exhaustive but merely provide general guidelines for consideration. The facts and circumstances of each particular case are crucial and would determine whether the judicial discretion is properly exercised. In *Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd*, *supra*, the High Court and the Court of Appeal refused to order security for costs against Triplan as the facts show that when Triplan claimed that Parkinson owed them 25,916 pounds under the contract, Parkinson wrote them an open letter offering a sum in settlement, the offer being equivalent to a payment into court in High Court proceedings. Further, in respect of the arbitration proceedings arising out of the said claim, Triplan had paid the arbitrator 300 pounds as security for his fees and expenses. It is obvious that the facts and circumstances there were different from those in the case before me in that an award has been made by the arbitrator against Luminous Crossroads in the sum of RM498,298 and that Luminous Crossroads has to date failed to settle the sum of RM5,365 being half the arbitrator's fees.

In *Gateway Land Pte Ltd v. Turner (East Asia) Pte Ltd* [1988] 2 CLJ 364; [1988] 2 CLJ (Rep) 732, the application under s. 388(1) of the Singapore Companies Act (Cap. 50) (s. 351(1) of our Act) for security for costs of an arbitration proceeding was dismissed by Sinnathuray, J of the Singapore High Court on the ground that arbitration proceedings should proceed without security for costs. In the case before me, the application is for security for costs in the originating motion in the High Court and not for costs of arbitration proceedings, even though, as stated above, Luminous Crossroads has not even paid half the arbitrator's costs.

In *Quality Tractors (M) Sdn Bhd v. United Asian Bank Bhd* [1980] 1 MLJ 95, an application for security for costs under s. 351 of the Companies Act 1965 was dismissed by Vohrah J even though the company was in receivership because the company's claim was found to be *bona fide* and an order for security would prevent the company from continuing with their claim. It is to be noted that the plaintiff there has issued four writs against the defendant bank claiming damages in relation to a number of dishonoured cheques. In the case before me, Luminous Crossroads was not issuing any writ to seek damages from Lim, but was instead applying for extension of time to set aside and also to set aside an arbitrator's award which has already been made against Luminous Crossroads.

In *Ashin Sdn Bhd v. Datuk Bandar Kuala Lumpur & Ors* [1999] 4 CLJ 115, the second defendant (but not the first and the third defendants) applied for an order to compel the plaintiff to provide security for costs on the ground that no accounts had been provided by the plaintiff since its incorporation and that because it has spent more than its paid-up capital, it was therefore insolvent. The learned deputy registrar's order that the plaintiff do provide for costs in the sum of RM37,000 was set aside by Kamalanathan Ratnam, J. The learned judge found as a fact that the plaintiff had provided the audited accounts for the years 1991-1994, in which case the plaintiff's impecuniosity could not have been an issue, as the plaintiff was allowed to participate in the tender exercise together with the second defendant. Further the learned judge found that the application for security for costs was clearly tantamount to an act of oppression. In the instant case, Luminous Crossroad has failed to file the accounts since 8 January 1998. Further, I am unable to come to a finding that Lim's aplication is tantamount to an act of oppression.

In *Skrine & Co v. MBf Capital Bhd & Anor* [1998] 3 CLJ 432, a case concerning s. 351 of the Companies Act 1965, the court of first instance concluded that in respect of the applications against the first plaintiff there was no credible evidence to warrant the exercise of discretion in favour of the defendants *viz.* Skrine & Co. However, the second plaintiff was ordered by the High Court to furnish security for costs and the High Court accepted a letter of undertaking from the first plaintiff in respect of those costs (see p. 443). Appeals to the Court of Appeal failed. The Court of Appeal held that s. 351 provides for a two stage inquiry in the process of arriving at the conclusion as to whether security for costs should be awarded in a particular case in which the plaintiff is a company. Gopal Sri Ram JCA said at p. 444 as follows:

> The first step is for the court hearing an application in this regard to determine whether there is credible evidence. The second step is to ascertain whether that evidence, when found to be credible, supports the belief that the company will be unable to pay the costs of a successful defendant.

His Lordship continued by referring to the dictum of Lord Denning MR in *Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd, supra,* and reiterated that there still remains a discretion in the court which may be exercised in all the circumstances of the case.

In *Mudariang Steel Mills Sdn Bhd (In Receivership) & 4 Ors v. Kwong Yik Bank Berhad & 2 Ors (And Anor Suit)* [1999] 7 CLJ 115, the first defendant's application for an order that the plaintiffs furnish security for costs was dismissed by the learned registrar but was allowed on appeal to T Selventhiranathan, J.

From the facts and circumstances of the application in encl. (8), it is common ground that O. 23 r. 1(1)(a) to (c) of the Rules of the High Court do not apply. The contention revolves around O. 23 r. 1(1)(d) ie, that Luminous Crossroads, as plaintiff, has changed its address during the course of the proceedings with a view to evading the consequences of the litigation. There is no dispute that Luminous Crossroads has changed its address. Besides that, since 8 January 1998, there is no record that Luminous Crossroads has ever filed their statutory financial reports and accounts under s. 169 of the Companies Act 1965, neither has it shown any record of its assets. Finally, it is not disputed that Luminous Crossroads has not settled its share of the arbitration costs.

In the circumstances, I am of the view that the above facts and circumstances would necessitate the exercise of my discretion under O. 23 and s. 351 to make an order for security for costs.

Security For Arbitrator's Award

The next issue concerns the security for payment of the arbitrator's award. This is regulated by s. 24(3) of the Arbitration Act 1952 which reads as follows:

> Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into court or otherwise secured pending the determination of the application.

Section 24(3) above gives the court a discretion to order security for the payment of an arbitrator's award. Apparently, it seems that there has been no judicial decision in which s. 24(3) has been ventilated or considered.

Section 23(3) of the English Arbitration Act 1950 which is in *pari materia* with our s. 24(3) has been considered only once, by the English Court of Appeal in *Alexandria Cotton & Trading Company (Sudan), Ltd v. Cotton Company Of Ethiopia, Ltd* [1965] 2 Lloyd's List Law Reports 447. In this case, a dispute on a contract for the sale of cotton between the claimant sellers and the respondent buyers was referred to arbitration where an award of 60,990 pounds 11s. 8d. was made in favour of the sellers. The buyers then filed a motion in court to remit and set aside the award. As the sellers had in hand on other accounts the sum of 45,000 pounds, the court ordered the buyers to pay the sum of 15,000 pounds, into court as security pending the determination of their application to set aside the award. Lord Denning MR did not elucidate or propound any guidelines or factors which the court must take into account when considering whether or not to exercise it's discretion under s. 23(3), but said at p. 448:

> It does not hurt the buyers to pay it. They have the money, and if they pay it, they can have their motion argued; and on being argued, if they are right, they will get the 15,000 pound back. Therefore, there is no harm to them. ... So they are not prejudiced.

The sole factor which His Lordship took into consideration in deciding whether or not to exercise the discretion in s. 23(3) is the prejudice which the buyers may suffer if the court orders payment into court of the award sum. The court dismissed the buyers' appeal and security was ordered in the form of payment into court as the buyers would not suffer any prejudice.

In New Zealand, s. 10(3) of the Arbitration Amendment Act 1938 which is also in *pari materia* with our s. 24(3) was considered by the High Court in Auckland in *Waiheke Homes Ltd v. Laughland* [1991] 3 NZLR 377.

As in Malaysia where there is a dearth of authorities on our s. 24(3), a similar situation prevails in other jurisdictions as reflected by Wylie J in *Waiheke Homes Ltd v. Laughland*, *supra*, at p. 380 para 45, as follows:

> It is the subject of very little judicial authority. According to the researches of counsel a virtually identical section, s. 23(3) of the Arbitration Act 1950 (UK), has produced only one reported case, *Alexandria Cotton & Trading Co (Sudan) Ltd v. Cotton Co of Ethiopia Ltd* [1965] 2 Lloyd's Rep 447, a decision of the Court of Appeal. Counsel also found a similar section in the Arbitration Act 1893 of Queensland but no reported authority thereon. Counsel could find only two instances in New Zealand where the section has been considered; *HW Broe Ltd v. Jones* (Wellington, CP 629/89, 2 November 1989) and *LE Borrell & Son Ltd v. Hulena* (Wellington, CP 526/90, 19 October 1990) both decisions of Master Williams QC. There is no

> commentary on the provision in *Halsbury's Laws of England* or in the standard texts of Russell on the Law of Arbitration (20th edn, 1982) or Mustill and Boyd's *The Law and Practice of Commercial Arbitration in England* (1982), other than a brief reference to the *Alexandria Cotton* case in the former.

Wylie J goes on to state at p. 381 para 5 that sub-s. (3) confers an unfettered discretion on the court. His Lordship then quotes from the decision of *Gardner v. Jay* [1885] 29 Ch D 50 at p. 58, where Gowen LJ said:

> ... when a tribunal is invested by Act of Parliament or by Rules with a discretion, without any indication in the Act or Rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run, for if the Act or the Rules did not fetter the discretion of the Judge why should the court do so?

Therefore, the crucial issue here is still the exercise of a discretion by reference to the particular circumstances of each individual case and that the court's first consideration is to achieve justice between the parties.

On the facts of *Waiheke Homes v. Laughland*, *supra*, the court did not make an order for the payment of money into court as the plaintiff was in a "shaky financial position" and would be unable to pay if an order were made. Further, if the order were enforced and the plaintiff was wound-up, this would prevent them from continuing with the substantive application unless a liquidator was disposed to do so and even then its application would be rendered nugatory. The court was also of the opinion that the defendants would suffer no prejudice if an order was not made and balanced this factor with the prejudice which the plaintiff will suffer ie, the fatal consequences of an irreversible winding-up. This was considered to be the real risk of injustice in that case and the application for payment into court was dismissed accordingly.

It is to be observed that the exercise of discretion by the courts in England and in New Zealand is exclusively dependent upon the facts and circumstances of each particular case. After having considered the facts and circumstances as alluded to above in the instant case, I am of the view that justice would be done to the parties herein by ordering security for the payment of the arbitrator's award.

However, in further exercise of my discretion, I hold that the proper order to be made is as follows:

That, within 30 days from the date of this order, Luminous Crossroads be ordered to pay a sum of RM30,000 by way of security for costs and the aforesaid award sum of RM498,298 to the fixed deposit interest bearing joint account of both the solicitors for Luminous Crossroads and for Lim as joint stakeholders, or by way of banker's guarantee, to be released only after the disposal of encl. (1) herein or pursuant to an order of the court, to secure the payment for the aforesaid sums and the proceedings in encl. (1) are to be stayed until the aforesaid form or forms of securities have been fulfilled by Luminous Crossroads.

Costs of the instant application in encl. (8) shall be costs in the cause.